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IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC'S PETITION FOR ARBITRATION PURSUANT TO SECTION 252(b) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICA-TIONS ACT OF 1996, AND THE APPLICABLE STATE LAWS FOR RATES, TERMS, CONDITIONS OF INTERCONNECTION WITH QWEST CORPORATION.

DOCKET NO. T-03654A-05-0350
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Arizona Corporation Commission
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QWEST CORPORATION'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED OPINION AND ORDER OF NOVEMBER 7, 2006

Qwest Corporation ("Qwest") respectfully submits these exceptions to the Recommended Opinion and Order ("ROO") issued by the Administrative Law Judge ("ALJ") in this docket on November 7, 2006. Qwest recommends that the Arizona Corporation Commission ("Commission") amend the ROO as set hereafter.

I. INTRODUCTION AND BACKGROUND

In its open meeting on June 27, 2006, the Arizona Corporation Commission ("Commission") adopted an amendment (Mayes Proposed Amendment #1) to the original ROO issued by Judge Rodda on April 7, 2006 ("Original ROO"). The amendment added language

only to the ordering provisions, and left the Original ROO otherwise unaltered. With the Mayes Amendment, the ordering clauses relating to the VNXX issues have three provisions[1]: First, Level 3 was clearly and unambiguously ordered to cease using VNXX by August 28, 2006; second, the parties were ordered to negotiate an interim replacement for VNXX which the Commission referred to as FX-like; and third, Qwest was required to pay $.0007 per MOU[2] on "FX-like traffic."[3] However, subsequent to the order, Level 3 has thwarted the operation of the Commission's Order. Level 3 refuses to adopt any interim solution that changes its network. Level 3's decision results in a refusal to discontinue VNXX, contrary to two very direct and unambiguous Commission orders.

Certainly this has not been an easy matter. There was no definition of the term "FX-like" in the Mayes amendment or in the Original ROO. The only clarifying language in the Mayes amendment stated that FX-like traffic would be routed over direct end office trunks, and that Level 3 would pay for such trunks. Thus, as adopted, Order No. 68817 provides no definition of "FX-like."

Not surprisingly, given the lack of definition of the term "FX-like," the parties struggled to negotiate the interim solution. The Commission Staff then assisted the parties via a mediation process. On September 22, 2006, Qwest filed a motion seeking approval for additional briefing on the impact on the issues in this docket of a decision of the Ninth Circuit Court of Appeals, *Verizon California v. Peevey,* 462 F.3d 1142 (9th Cir., September 7, 2006) ("*Peevey*"). More specifically, Qwest requested the opportunity to brief the issue of whether the Commission's

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[1] Order, Decision No. 68817, at p. 82.

[2] The $.0007 per MOU rate is the current capped rate for ISP traffic subject to the *ISP Remand Order.* Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

[3] The same directive was issued by the Commission in another Order, Decision No. 68855, in which the Commission ordered that "Level 3 shall cease and desist from the use of VNXX, and the parties shall work together to implement an interim replacement for VNXX traffic consistent with our directive in Decision No. 68817."

order requiring Qwest to pay compensation on such "FX-like traffic" complies with binding federal law.

After Level 3 determined that it would not change its network, and therefore the parties could not agree on language to implement Order No. 68817, a Procedural Conference was held on October 3, 2006, at which time the Staff (apparently no longer acting as a mediator, but now as an advocate for one point of view), distributed amendatory language, including language that remained in dispute. The Staff's language has not been subjected to any analysis or testimony in hearings.

At the Procedural Conference Qwest argued that, given the fact that no factual evidence had been presented on the types of traffic and network re-configurations that would result in "FX-like traffic," that factual and related legal issues remained unresolved that required testimony, a hearing, and briefing.[4] Level 3 opposed the filing of testimony, holding an evidentiary hearing, and further briefing.[5] Staff agreed with Level 3 regarding testimony and a hearing, but did suggest that briefing would be appropriate.[6]

The Staff's proposed language has been adopted by the ROO, over the objections of Qwest. The language adopted by the ROO sanctions Level 3's continued use of VNXX, in stark violation of the Commission's previous orders that Level 3 should cease VNXX. Instead of discontinuation of VNXX, the ROO adopts a fictional approach to compliance. The proposed language provides a way for Level 3 to continue to pay lip service to, but in reality ignore, the Commission's orders, while pretending it has complied, by paying for non-existent ("virtual") collocation and make-believe services. That approach is erroneous on its face. Unless the Commission intends to explicitly reverse its previous Orders from Decision Number 68817 and

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[4] Qwest claimed that briefing should address (1) factual and legal issues regarding the "FX-like traffic" issue and (2) legal issues related to whether an "FX-like traffic" approach was compliant with governing federal law in the Ninth Circuit. *Procedural Conference Transcript* at 6-8, 12-13, 15, 24-25, 30-31.

[5] *Procedural Conference Transcript* at 9, 18-21.

[6] *Id.* at 12.

Decision Number 68855 pursuant to the Commission's powers to rescind or amend under Section 40-252, it should recognize that the proposed language renders null its prior Orders, and reject the ROO as it is written.

Qwest respectfully requests that the Commission reject the ROO. The Commission must hold hearings in this matter to determine what is "FX-like," and do so in a context in which the result is not simply one where VNXX has been painted over and given a new name.

EXCEPTIONS

A. The ROO Would Effectively Reverse the Prohibition Against VNXX Ordered in Decision No.s 68817 and 68855.

Decision Nos. 68817 and 68855 unambiguously order Level 3 to cease and desist from the use of VNXX. Instead, the parties were directed to devise an interim solution relating to what the Commission named "FX-like traffic." VNXX was correctly described in the Decision 68817.[7] FX was described correctly in Decision 68817.[8] The Commission concluded that FX and VNXX are not the same. Qwest respectfully submits that these matters are so plain as to be unmistakable. Yet, in an astonishing interpretive pirouette, the ROO concludes that what the Commission meant was not that VNXX must be discontinued, and replaced by some other network design. The ROO concludes that in requesting an "FX-like" interim solution, the Commission did not mean it should be comparable to FX (a conclusion that results in the patently wrong conclusion that "FX-like" does not mean "like FX."). Instead, according to the

[7] " 'VNXX traffic' is all traffic originated by the Qwest End User Customer that is terminated to CLEC's End User Customer who is not physically located within the same Qwest Local Caller Area (as approved by the state Commission) as the originating caller, and CLEC's End User is assigned an NPA-NXX in the Local Calling Area in which the Qwest End User Customer is physically located. VNXX does not include FX." Order, Decision No. 68817, pp. 29-30. (Emphasis added.)

[8] "[I]n FX service, the ISP pays for local access and for transport of the traffic to its equipment in a distant LCA." Order, Decision No. 68817, pp. 26-27.

ROO, the Commission meant that "Level 3 should be allowed to continue using VNXX-type arrangements,"[9] a conclusion that renders the twice-repeated order that Level 3 discontinue the use of VNXX a complete nullity.

This is pure revision. Although the Commission gave little guidance on "FX-like traffic" it was exceedingly clear about what VNXX is,[10] and that it must be stopped. VNXX has not been stopped, nor would it be stopped if the ROO is adopted.[11] The fact that Level 3 would be able to continue doing exactly what it was doing before with no need to alter its network in any way simply underscores the fact that the amendment approved by the ROO does grave a disservice to the original orders. .

Mere wordplay cannot save the ROO. It cannot be said that the solution proposed is "FX-like" because the underlying network structure is unchanged. Putting a misleading label on something does not change the reality, and the reality in this case is that Level 3 continues to employ VNXX.

Although virtual reality may be great entertainment, it does not belong in law or regulation. One need only review the words of paragraph 6 adopted by the ROO, to see that the proposal is a sham:

> "Level 3 shall establish a virtual POI in each Qwest Local Calling Area . . ."
>
> "Level 3 agrees to compensate Qwest via monthly payments equivalent to the MRC charges for Private Line . . . from the virtual POI to each end office in the Local Calling of Area of the virtual POI, as if facilities were provisioned . . .:"

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[9] ROO, paragraph 22.

[10] Footnote 1 of the ROO makes it clear, yet again, that VNXX "is an arrangement under which a carrier assigns a phone number to a customer that is not physically located in the same rate center or exchange with which the number is associated. The effect is that calls that would otherwise be rated and routed as long distance toll calls, are rated and routed as local calls." The language mandated by the ROO explicitly allows this practice to continue.

[11] The effect of Staff's language adopted by the ROO is best summarized by Staff's Attorney Ms. Scott, who stated the issue: "Did the Commission intend that the parties implement an interim arrangement using the existing VNXX arrangements . . . or did the Commission intend at this point in time for Level 3 to redo its network to implement the FX-like service before the outcome of the generic docket?" Transcript of Proceedings, October 3, 2006, pp. 11-12.

"Level 3 agrees to make a one time payment to Qwest to reimburse Qwest as if Qwest had constructed ICDF collocation in each Local Calling Area . . ."[12]

In short, Level 3 proposes to pretend to comply. However, pretend solutions come with their own sets of problems. If the Commission approves the ROO, doubtless other carriers will seek to utilize the same fictions, and the Commission's original disapproval of VNXX will effectively be reversed, not just for Level 3, but for all carriers. Indeed, would one not expect that the next carrier would argue that the charges were not reasonable, since in fact nothing is provided for the fees?

If the Commission desires to reverse its decision requiring Level 3 to cease using VNXX, the proper mechanism is to institute a proceeding under A.R.S. 40-252, a statute which provides that the Commission may alter any decision, upon notice, and after opportunity to be heard. Because it is apparent that Level 3 refuses to cease using VNXX, Qwest respectfully urges the Commission, as part of the further proceedings requested herein, to consider ruling that Level 3 may not recover terminating compensation at $0.0007 on what is clearly banned VNXX traffic under the Commission's Orders.

B. The ROO Violates Qwest's Due Process Rights By Refusing To Allow Testimony, a Hearing, and Briefing on the Subject of "FX-like Traffic."

The ROO, if adopted, would violate Qwest's due process rights. Qwest is entitled as a matter of law to present factual evidence related to new and unresolved factual issues. The issue of an "FX-like traffic" amendment, and the requirement that Qwest pay terminating compensation on such traffic, was not the subject of hearing. The Order states:

> Although we disapprove Level 3's use of VNXX, as it has been described in this proceeding, Level 3 should be able to serve customers through FX or an FX-like service. In addition, there *may be* ways Level 3 could use "VNXX-like" arrangements and compensate Qwest for transport (perhaps using a TSLRIC rate) that would alleviate our concerns about intercarrier compensation distorting the market by improper cost shifting. *Evidence of how such a scheme might work, or if it could work, was not offered in this docket, but we would not want to eliminate such compensation scheme and encourage the parties to be creative in creating a "win-win" resolution and present a revised ICA for our approval.* (Order, at 29; emphasis added).

[12] Exhibit A, ROO, ¶ 6.

The Order correctly states that evidence related to an "FX-like" solution was never presented at hearing.

That the term remains undefined is clearly demonstrated by the last sentence of the ROO, which states that '[i]n referring to the interim arrangements as 'FX-like,' the Commission did not intend that such arrangement would be comparable to the FX service being provided by Qwest." (ROO ¶ 22). This is baffling. If the term was not intended to be "comparable" to Qwest's FX service, then what was it to comparable to? The only FX service that was even mentioned in the hearing was Qwest's FX service; thus, the record is completely devoid of any evidence that could possibly assist the Commission or parties in defining the term. Thus, a new, and very important, factual issue was raised by the adoption of the Mayes amendment, an issue that was not addressed in the hearing in this matter. As a matter of due process, Qwest is entitled to present factual evidence on that issue. By denying Qwest that opportunity, the ROO violates Qwest's due process rights to present evidence on a critical factual issue.[13] Here, the due process violation is even more egregious in that the factual issue did not arise until after the hearing.

C. The ROO, by Denying Qwest the Opportunity to Brief the *Peevey* Decision and its Implications for the ICA in this Case, Ignores Binding Federal Law, and Thus Violates the Act and Qwest's Rights.

In the time since the Commission's Order was issued on June 29, 2006, three significant federal circuit court decisions have been issued that have addressed the issue of compensation for

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[13] *See Curtis v. Richardson*, 131 P.3d 480, 484 (Ariz. 2006) ("Due process entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner.") (citing Comeau v. Ariz. State Bd. of Dental Exam'rs, 993 P.2d 1066, 1070-71 (Ariz. App. 1999)); *see also Univ. of Iowa Hospitals and Clinics v. Waters*, 670 N.W.2d 432 (Iowa App. 2003) (finding that workers' compensation commission abused its discretion by considering an issue "which was a new issue raised at the time of the administrative hearing," and explaining that, "[u]nder due process principles, notice should inform a party of the issues involved in order to prevent surprise at the hearing and allow an opportunity to prepare.").

ISP traffic, one from the D.C. Circuit,[14] one from the Second Circuit,[15] and, most important of all, the Ninth Circuit's September 7, 2006 decision in *Peevey*. Arizona, of course, is located in the Ninth Circuit, and the *Peevey* case therefore provides specific, binding guidance for state commissions located in that Circuit. Qwest will not repeat the entire argument it made in its Motion to Allow Additional Briefing, but merely reminds the Commission that the Ninth Circuit ruled, among other things, that:

(1) The compensation regime of the *ISP Remand Order* applies only to calls delivered to an ISP located in the caller's local calling area and does "not affect the collection of charges by ILECs for originating interexchange ISP-bound traffic" 262 F.3d at 1159. Thus, if the ROO is adopted, the result will be the unlawful application of the *ISP Remand Order* to calls that *are not* delivered to an ISP in the same local calling area as the calling party.

(2) The Ninth Circuit affirmed the California commission's ruling that "VNXX traffic is interexchange traffic" that is not subject to the FCC's rules governing the payment of terminating compensation. *Id.* at 1158. The ROO, if adopted, would unlawfully require Qwest to pay terminating compensation on interexchange traffic for which Qwest has a lawful right to receive, rather than pay, intercarrier compensation.

(3) For purposes of determining whether traffic is VNXX traffic (traffic that is explicitly banned under Order Nos. 68817 and 68855), the relevant end point is where the CLEC's "network ends and the call is picked up by the customer. Since that is the end of [the CLEC's] responsibility for the call, it should also be the relevant end point for

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[14] *In re Core Communications,* 455 F.3d 267, 271 (D.C. Cir., June 30, 2006) (finding the *ISP Remand Order* "found that calls *made to ISPs located within the caller's local calling area* fall within those enumerated categories – specifically, that they involve 'information access.'"). (Emphasis added).

[15] . In *Global NAPs v. Verizon New England,* 454 F.3d 91, 99 (2nd Cir., July 5, 2006) ("*Global NAPs II*") ("The ultimate conclusion of the 2001 Remand Order was that *ISP-bound traffic within a single calling area* is not subject to reciprocal compensation.") (Emphasis in original).

purposes of determining whether the call is local or VNXX." *Id.* at 1159. Applying this test, the ROO would require that Qwest pay terminating compensation on traffic that is not local and that is clearly VNXX in nature. The ROO, if adopted, would thus directly violate Ninth Circuit law.

As "delegated federal regulators," state commission must follow binding federal law.[16] In this case, the federal circuit court that directly governs the Commission has ruled on several critical issues directly relevant to the ICA at issue in this case. This is not a situation where, several months after an ICA had been placed into effect, a binding court decision was issued that had to be addressed under change of law provisions in the ICA. *Peevey* was decided before the Commission had reached a final decision on key open issues in the case—indeed, *Peevey* addresses the very issue that has been the subject of the ongoing unresolved issues. It speaks directly to the lawfulness of imposing an "FX-like traffic" solution and to the incongruous result that Order No. 68817, on the one hand, bans VNXX in no uncertain terms, and then gives VNXX new life through the undefined euphemism "FX-like traffic."[17] The ROO's refusal to address *Peevey* and its deferral of any consideration of the decision until the future VNXX docket) is erroneous, given that the case provides guidance on current issues before the

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[16] State commissions are required to make their decisions consistent with the Act, FCC orders like the *ISP Remand Order*, and the federal court decisions that interpret them. Under the federal act, Congress delegated several specific and narrowly-defined tasks to state commissions, including the authority, as in this case, to resolve disputed language in an ICA. The Seventh Circuit has characterized the state commissions as "deputized federal regulators." *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 343-44 (7th Cir. 2000).

[17] In footnote 1 of the ROO, the ALJ reaffirms the definition of VNXX as "an arrangement under which a carrier assigns a phone number to a customer that is not physically located in the rate center or exchange with which that phone number is associated. The effect is that calls that would otherwise be rated and routed as long distance calls, are rated and routed as local calls." Yet, as implemented by the ROO, this is precisely what is allowed by the mandated "FX-like traffic" amendment. The result is the logically incongruous situation of the Commission, on the one hand, banning VNXX and, on the other hand, renaming it and allowing it. The fact that Level 3 is able, under the ordered amendment, to continue doing exactly what it was doing before with no need to alter its network in any way simply underlines the fact that Level 3 is allowed to continue to use VNXX.

Commission *in this docket*. The Commission's deferral of consideration of *Peevey* to a future generic docket on VNXX is thus inappropriate and unlawful. The Commission has a responsibility to apply *existing* federal law. By refusing to even consider *Peevey*, the Commission has unlawfully failed to perform its duty under section 252 of the Act.

II. CONCLUSION

On the basis for the foregoing, Qwest respectfully requests that the Commission:

(1) reject the ROO's conclusion permitting VNXX pending the generic VNXX proceeding, and reject the proposed language set forth in Exhibit A to the ROO.

(2) order that Level 3 may not recover terminating compensation at $0.0007 on what is banned VNXX traffic under the Commission's Orders;

(3) order that testimony be filed by the parties on fact issues raised by the language inserted into Order No. 68817 pursuant to the Mayes amendment, that a hearing be held with regard thereto, and that the parties be allowed to submit briefs on those issues; and

(4) order that the parties be allowed to address the legal impact of the *Peevey* decision (and other developments in federal law since the issuance of Order No. 68817) on the issues related to the ICA in this docket.

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RESPECTFULLY SUBMITTED this 16th day of November, 2006.

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